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| JAMES TAYLOR |) | |
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| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
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| PHOENIX MARINE COMPANY |) | DATE ISSUED: 11/25/2009 |
| |) | |
| and |) | |
| |) | |
| SIGNAL MUTUAL INDEMNITY |) | |
| ASSOCIATION, LTD. |) | |
| |) | |
| Employer/Carrier- |) | |
| Respondents |) | DECISION and ORDER |

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Daniel A. Dutton (Grey & Grey, L.L.P.), Farmingdale, New York, for claimant.

John F. Karpousis (Freehill Hogan & Mahar, LLP), New York, New York, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2008-LHC-00941) of Administrative Law Judge Ralph A. Romano rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On July 20, 2005, claimant was working as a lead engineer and boat captain for employer when he fell backwards off a ladder, injuring his lower back and head. He was transported to the hospital where he was diagnosed as suffering burst fractures of two different vertebrae. Claimant was fitted with a back brace and began physical therapy while in the hospital. He continued to complain of pain after his release from the hospital and was treated with physical therapy and pain medication. Employer paid claimant temporary total disability benefits from July 30, 2005 until September 21, 2007. Claimant has not returned to work and sought permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant has not established that he cannot return to his usual duties as a lead engineer and boat captain. In addition, the administrative law judge found that, assuming claimant had established a *prima facie* case of total disability, employer established the availability of suitable alternate employment as claimant can perform the jobs identified in employer's labor market survey. Therefore, the administrative law judge denied the claim for additional compensation benefits, but found that claimant is entitled to benefits for reasonable and necessary medical treatment resulting from his work-related injury.

On appeal, claimant contends that the administrative law judge erred in finding that claimant can return to his former duties as he mischaracterized claimant's job duties. Moreover, claimant contends that the administrative law judge should have considered claimant's use of, or dependence on, narcotic medication, as this would impair claimant's ability to operate machinery, and that the administrative law judge erred in relying on surveillance videotapes as they do not show work capacity. Claimant also contends that the evidence establishes that claimant's disability is permanent and that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Employer responds, urging affirmance of the administrative law judge's decision denying benefits.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. See *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In order to establish a *prima facie* case of total disability, claimant must establish that he is unable to perform his usual work due to the injury. See, e.g., *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). Claimant's usual employment comprises all of his regular duties at the time he was injured. *Delay*, 31 BRBS 689; *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). In order to determine whether a claimant can return to his usual work, the

administrative law judge must compare the claimant's medical restrictions with the physical requirements of the usual employment. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985).

In this case, the administrative law judge addressed claimant's testimony regarding his usual job duties, as well as that of Mr. Cuminsky, a former project manager and 17-year employee of employer's, and of Mr. Pettit, a co-worker. The administrative law judge found that claimant's duties as lead engineer included acting as a liaison between the union members and employer's supervisors, attending safety meetings, filling out daily reports, handling employee pay checks and time cards, assigning jobs to employees, making sure the correct machines are at the job site, and transporting a hose and cans to fuel the machines on the jobsite. *See* Tr. at 116-117, 119, 125-127 230-238. The administrative law judge also specifically found that claimant's duties do not include operating a crane, lifting lumber and debris, lugging concrete, or repairing or fixing the machines. Decision and Order at 26-27. He noted that claimant may have done these activities gratuitously and occasionally to help his fellow employees, but that they were not a part of his job requirements. In addition, the administrative law judge found that as a boat captain, claimant was required to ferry the state inspectors to various places on the job site, and to either affix the boat to pilings or keep it stationary. He found that claimant's duties do not include painting the boat or performing mechanical work on the boat. *Id.* at 27. The administrative law judge rationally credited the testimony of Mr. Cuminsky and Mr. Pettit when it conflicted with that of claimant. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the administrative law judge's findings regarding claimant's usual job duties are supported by substantial evidence. Thus, they are affirmed. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961).

In determining claimant's current medical restrictions, the administrative law judge reviewed the surveillance videotapes of claimant and the opinions of the four physicians of record. The administrative law judge found that the videotapes show claimant performing activities that are within the requirements of his job duties. The tapes show claimant standing and driving for lengthy periods, as well as carrying and lifting items of 20 pounds or less. They also show claimant's ability to bend and to easily get out of a chair. EX D.

With regard to the medical opinions, the administrative law judge found that Dr. Benatar, claimant's treating physician, opined that claimant's strength and sensation was nearly full and deemed to be normal and intact. He further opined that claimant could sit and stand or walk intermittently for three hours in an eight-hour work day. CX V at 63. After reviewing some of the surveillance videotape, Dr. Benatar acknowledged inconsistencies in his assessment of how far claimant could drive and how well claimant

tolerated driving. Dr. Sultan performed an examination on November 30, 2006, and concluded that claimant could perform only light or sedentary work. CX O at 2. The administrative law judge noted that Dr. Sultan did not review the surveillance videotape before reaching his conclusion. The record also contains two reports by Dr. de Moura, who found claimant to be neurologically intact and that the “end point in orthopaedic treatment has been attained.” CX P; EX J; CX N at 9. Dr. de Moura was deposed after reviewing the surveillance videotape and opined that claimant should attempt some work activity. He opined that claimant can now intermittently climb a ladder, work a desk job, and operate a small boat, if there are no waves.¹ EX N. Finally, the record contains the reports and testimony of Dr. Carter, in which he opined that claimant has recovered from his injuries, that his fractures have healed, and that claimant is capable of returning to his prior occupation. After reviewing the surveillance video, Dr. Carter noted that claimant walks with a normal gait, shows no evidence of radiculopathy weakness in his trunk or either of his legs, has excellent strength in his legs, and has normal range in his lumbar back. Thus, Dr. Carter concluded that he would not place any restrictions on claimant’s return to work. Tr. at 183-184. He stated claimant’s use of a cane was a “theatrical prop.” *Id.* at 178.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge thoroughly reviewed the medical opinions of record, as well as the surveillance videotapes, and concluded that Dr. Carter’s opinion is the most convincing medical opinion in the record, as he had considered claimant’s current condition as evidenced by the surveillance videotapes, claimant’s complaints, and his own medical observations. Moreover, contrary to claimant’s contention, Dr. Carter did not opine that claimant had a dependence on narcotic medication or recommend detoxification treatment, but rather answered a hypothetical question regarding the recommended usage of pain medication; he did not think claimant was dependent on narcotics. Tr. at 222, 225. The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). As the administrative law judge’s findings of fact and conclusions of law are rational and supported by substantial evidence, they are affirmed. *Id.* Thus, we affirm the administrative law judge’s finding that claimant did not

¹ The videotapes show claimant diving in the ocean without distress. The administrative law judge rationally found that the force with which the waves hit claimant in the ocean would be no greater than that of the waves he experienced on the boat. Decision and Order at 27.

establish an inability to perform his usual work, and the consequent denial of additional disability benefits.² *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

² As we affirm the administrative law judge's finding that claimant did not establish a *prima facie* case of total disability, we need not address claimant's other contentions regarding the nature and extent of his disability.